SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1155

ESTATE OF WILLIAM S. HULL, DECEASED, MESSRS. JONATHAN W. HULL AND WILLIAM HAROLD CARPENTER, SURVIVING EXECUTORS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

Subject Index.

Table of Cases Cited.

Statutes and Regulations Cited.

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vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Supreme Court of the United States and the Honorable Justices thereof:

The petition of the Estate of William S. Hull, deceased, Messrs. Jonathan W. Hull and William Harold Carpenter, surviving executors, praying for a writ of certiorari with respect to the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered the 23rd day of

January, 1942, and in support thereof, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

In the preparation of his Federal Income Tax return for the year 1936, William S. Hull (who, having died in 1938, is hereinafter referred to as decedent), the owner of one-third of the issued and outstanding capital stock of Primal Realty Corporation, a New York Corporation (hereinafter referred to as Primal), deducted the sum of $18,200. as a loss due to the worthlessness of his stock holding. The deduction was disallowed by the Commissioner of Internal Revenue and a deficiency was assessed in the sum of $3,961.21.

On August 12, 1940, the Board of Tax Appeals, passing upon a petition for redetermination of the deficiency affirmed the determination of the Commissioner. Its decision is not reported (R. 13-22). On January 23, 1942, the Circuit Court of Appeals, Second Circuit, passing upon a petition to review the decision of the Board of Tax Appeals, entered its judgment of affirmance. The written opinion is reported in 124 F. (2d) 503.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The surviving executors of the Estate of William S. Hull, deceased, were permitted by order made by the Circuit Court of Appeals for the Second Circuit, on the 16th day of April, 1941, to continue and prosecute the appeal to that Court without prejudice to the proceedings already had or taken (R. 98-100).

The question presented herein is whether the Circuit Court of Appeals for the Second Circuit erred in failing to

reverse the determination of the Commissioner and the decision of the Board of Tax Appeals and to find that upon the evidence the loss was sustained in 1936, the year claimed by decedent.

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 29-31.

Primal was incorporated in 1929 with an authorized capital stock of $54,600. All of the stock was issued for cash at its par value of $100. per share—182 shares to decedent, 182 shares to O. D. & H. V. Dike (a corporation formed by Oscar Dike and Herbert V. Dike) and 182 shares to Frank Titchenor (R. 13).

Shortly after its incorporation Primal purchased six parcels of real estate constituting a corner property and known by the street numbers 2120, 2122, 2124, 2126 and 2128 Eighth Avenue and 280 West 115th Street, in the Borough of Manhattan, City of New York. The cost to Primal was $157,500; $54,600. in cash and $102,900. in mortgages to which the various properties were held subject (R. 13).

Decedent owned two mortgages, each for $15,000. on Nos. 2120 and 2126 Eighth Avenue; one mortgage for $22,000. on No. 2128 Eighth Avenue and one mortgage for $12,000 on No. 280 West 115th Street, making his total holding of mortgages $64,000. A mortgage for $15,000. on No. 2122 Eighth Avenue was held by Mrs. Audrey Woodward, and a mortgage of $16,000. on No. 2124 Eighth Avenue was held by Church of the Incarnation (R. 14). There was a blanket second mortgage on the five parcels on Eighth Avenue which was subsequently paid (R. 15).

The properties were improved, the five on Eighth Avenue each with a six story tenement on a plot 100 feet by 100 feet, with stores on the ground floor and apartments above, and the lot on 115th Street with a store on the ground floor and apartments above; all were old law tenements (R. 14).

The buildings were profitable during the first year that Primal owned them and the latter was able to pay off the second mortgage out of the revenues, leaving the other six mortgages aggregating $95,000. wholly unpaid (R. 35). With the general depression which started in the early 1930's conditions changed and the property became less productive. They were unable, ultimately, to produce sufficient income to meet the carrying charges, taxes and interest, resulting in a net annual loss in the years 1933 to 1937 inclusive (R. 17).

The Dike Corporation was the managing agent for the properties from the time of their acquisition. The income from all of the properties was commingled in one account by the managing agent and disbursements on account of all of the parcels were made from such account (R. 34).

In 1935, the property had ceased to earn sufficient to pay all of the carrying charges. Church of the Incarnation demanded an assignment of the rents of No. 2124 Eighth Avenue upon which it held a mortgage. Such assignment was made (Pet. Ex. 12, R. 78-84). An assignment was also made of the rents of the property 2122 Eighth Avenue to Mrs. Audrey Woodward, holder of the mortgage upon that property. It is not certain whether the latter assignment was made in 1935 or 1936.

No assignment of rents of the properties upon which decedent held four mortgages was made until 1936. Taxes on all the properties, amounting to $18,892.95 at the end of 1936, were in arrears; also interest on the mortgages (R. 17). The corporation was unable to meet these arrears, and upon insistence by the decedent an assignment of rents of the properties upon which he held his four mortgages was made in 1936. This assignment was oral. In the same year decedent paid the arrears of taxes on the properties upon which he held mortgages (R. 44, 45).

Subsequent to the rental assignment to decedent, the managing agent kept separate accounts of receipts and disbursements of each parcel of property and accounted to the respective mortgagees therefor. With the year 1936, Primal ceased to exercise control over the properties and possession thereof was, for practical purposes, in the hands of the respective mortgagees. It was not deemed necessary that decedent should foreclose his mortgages "because he was in the position, if he asked any time, he could have gotten a deed for the property" (R. 45). Oscar Dike offered to give decedent all the stock of Dike interests, but decedent refused to accept it, because he thought that it might involve him in the other two pieces of property. "He considered that there was no value above the mortgages, and he did not want to involve himself at all. He considered the stock worthless and had forgotten it" (R. 45, 46). Dike testified that "that conversation was held some time during 1936" and that it was "all after the thing had been turned over to him" (R. 46).

In 1936 fire retarding violations were issued against the properties, pursuant to the Multiple Dwelling Law of the State of New York. The cost of making the necessary repairs to comply with the violations filed against the properties upon which decedent held mortgages was about $8,000. (R. 46). The necessary repairs and alterations were made in different years, one house was not finished until 1939; on some of the others work was completed in 1938, and some in the latter part of 1937 (R. 47).

The fair market value, in 1936, of all of the properties acquired by Primal was $92,000 (as a contiguous corner property). This value was likewise reflected in 1933, 1934 and 1935 (R. 51).

Primal's liabilities on December 31, 1936, aggregated $118,481.32, of which $95,000. represented the principal indebtedness on the mortgages and $23,481.32 represented

arrears in interest and taxes. (Pet. Ex. 4, R. 57). The cost of compliance with the violations filed would have increased the liabilities in the sum of $12,000. The cash reflected on Primal's balance sheets as of December 31, 1936, was evidently held for the account of decedent.

Three identifiable events occurred in 1936 which justified decedent's determination in that year that his stock holding in Primal was worthless: (1) Primal's assignment of rents to decedent on the properties upon which decedent held mortgages, representing the final relinquishment by Primal of its property; (2) decedent's payment of taxes in arrears by reason of Primal's inability to satisfy them; and (3) the issuance of violations which Primal was unable to remove.

The Commissioner of Internal Revenue took the view that Primal was a going concern in 1936 and that no identifiable event occurred in that year "such as foreclosure of mortgages, receiverships, etc. which would definitely and permanently place the loss within such period" (R. 10).

The Board of Tax Appeals sustained the disallowance of the claimed loss *but it made no finding that Primal "was still a going concern" in 1936.* The Board of Tax Appeals indicated that it might be difficult to arrive at the conclusion that a mere assignment of rents justifies an inference of abandonment; but it placed the basis for its refusal to regard the assignment to decedent as an identifiable event on the ground that the assignment was made in 1935 and not in 1936. The Board found that decedent paid the arrears in taxes in the year 1936 and that violations were issued in that year requiring an expenditure of about $8,000. upon the properties on which decedent held mortgages. It did not, however, regard these facts as identifiable events indicating that reasonable hope and expectation of value at some future time had been foreclosed.

The insolvency of Primal was deemed a condition which existed for a number of years.

In its opinion of affirmance the Circuit Court of Appeals, Second Circuit, found that the rent assignment to decedent was made in *1936*. It found that Primal was insolvent in 1936 and also prior thereto. The Appellate Court determined that there was no intention to abandon the property and *that Primal "was still a going concern in 1936."*

B.

Reasons Relied On for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Second Circuit erred in holding that Primal was still a going concern in 1936, since the testimony shows that the corporation relinquished some of its properties in 1935 and the balance in 1936, leaving it without assets to pay arrears in taxes and to pay the cost of making the alterations required pursuant to the violations which had been issued. Mere existence of the corporation, and even the carrying on of corporate functions, are not factors which enter into a determination of the question whether a stockholder was justified in giving up his hope and expectation of salvaging some value out of his stock holding.

2. The Circuit Court of Appeals made conflicting and inconsistent findings in that it determined (a) that decedent's stock became worthless before 1936 and (b) that decedent's stock did not become worthless in 1936 because there was no intention to abandon the corporate property and the corporation was still a going concern in 1936.

3. The decision rendered by the Circuit Court of Appeals conflicts with the findings of the Board of Tax Appeals in that (a) the Board of Tax Appeals did not find that the corporation was still a going concern in 1936 and (b) the Board of Tax Appeals found that the assignment of rents to the decedent was made in 1935 while the Circuit Court of Appeals found that the assignment was made in 1936.

4. The Circuit Court of Appeals erred in holding that the Commissioner's determination and the decision of the Board of Tax Appeals were sustainable upon the evidence.

5. The Circuit Court of Appeals erred in affirming the decision of the Board of Tax Appeals and in holding that the Board of Tax Appeals had substantial evidence to support its finding that the stock did not become worthless in 1936.

6. The Circuit Court of Appeals erred in determining that there was no intention to abandon the Primal property in 1936 since abandonment took place in fact.

7. The Circuit Court of Appeals erred in considering, as a separate and independent factor, Primal's insolvency prior to 1936. While insolvency of a corporation may be a necessary element in establishing the worthlessness of the corporate stock, it is only one factor to be considered and its occurrence in a particular year is immaterial, unless there is linked with it such fact or facts which indicate that there is no reasonable hope or expectation of the realization of value, at some future time, from the corporate stock. To consider insolvency prior to 1936, as an independent factor, and as the controlling factor, would impose upon the taxpayer the obligation of foreseeing with accuracy the occurrence of future events.

8. The Circuit Court of Appeals erred in affirming the decision of the Board of Tax Appeals in that the latter relied principally upon its finding that the rent assignment to decedent was made in 1935, whereas the testimony establishes clearly that it was made in 1936, and the Circuit Court so found. The principal finding made by the Board is, therefore, without substantial evidence to support it.

9. The effect of the findings, rulings or opinions (1) that Primal was still a going concern in 1936, and (2) that the

conditions upon which decedent relied in taking his stock loss had existed for a number of years (indicating the possible propriety of a deduction prior to 1936) is to place the taxpayer in the position of being denied the right to deduct the loss—a right which is granted under the taxing statutes. Treasury Regulations 94, promulgated under the Revenue Act of 1936, Article 23 (e-1), state that "Substance and not mere form will govern in determining deductible losses." If the ruling in the instant case is permitted to stand, it will amount to a construction of these Regulations to the effect that a determination by the Commissioner against the weight of evidence estops the taxpayer and deprives him of his property without due process of law. If the ruling is permitted to stand it will lead to the result that a taxpayer may be penalized for his inability to foresee with absolute accuracy the precise moment when his investment becomes worthless. It would tend to lead to a disregard of the realistic view of a tax situation. The hollow shell of corporate existence—*mere form—would be deemed paramount to substance*, as evidenced by the relinquishment of corporate property in 1936, decedent's payment of tax arrears in 1936, and the issuance of violations against the corporate property, which Primal was unable to remove.

10. It is submitted that the Circuit Court of Appeals erred in affirming the decision of the Board of Tax Appeals upon the "substantial evidence" rule, since the Board's decision was against the weight of evidence. It was not the intent of Congress, in passing the taxing statutes, to grant to the Board power to make a finding contrary to the weight of evidence; nor do the decisions hold that the determination of the Commissioner is "presumptively correct" if such a determination was made against the weight of evidence.

11. Under a virtually similar taxing statute the Appellate Division of the Supreme Court of the State of New York, Third Department, decided that the loss which decedent suffered by virtue of his stock holding in Primal was properly deducted in the year 1936. The decision was rendered on January 7, 1942, and it is reported in *People ex rel. Hull* v. *Graves*, 263 N. Y. App. Div. 223. (An appeal therefrom, by the State Tax Commission of the State of New York is presently pending in the New York Court of Appeals).

12. The Commissioner of Internal Revenue and the Board of Tax Appeals erred, and the Circuit Court of Appeals erred in affirming the decision of the Board of Tax Appeals, in that the Board and the Commissioner limited the nature of an identifiable event to foreclosure of mortgages, receiverships, bankruptcy, suspension of business, or liquidation. There is no requirement that a corporation must divest itself of title to its real property by liquidation or otherwise in order to sustain a claim that its capital stock is worthless.

13. The Circuit Court of Appeals and the Board of Tax Appeals failed to consider an array of facts which, together with proper inferences to be drawn therefrom, amply justified the deduction made by decedent.

WHEREFORE your petitioner respectfully prays that this petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, to review the judgment of said Circuit Court of Appeals in this case, be granted.

ESTATE OF WILLIAM S. HULL,
Deceased,
JONATHAN W. HULL,
WILLIAM HAROLD CARPENTER,
Surviving Executors,
By AARON FRANK,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

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No. 1155

ESTATE OF WILLIAM S. HULL, DECEASED, MESSRS. JONATHAN W. HULL AND WILLIAM HAROLD CARPENTER, SURVIVING EXECUTORS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Board of Tax Appeals, a memorandum decision, dated August 12, 1940, is not reported, but it is set forth at length in the Record on pages 13-22.

The written opinion of the Circuit Court of Appeals for the Second Circuit is reported in 124 Fed. (2d) 503. (R. 104)

II.

Jurisdiction.

1. The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

2. The opinion of the Circuit Court of Appeals for the Second Circuit is dated the 7th day of January, 1942, and said court, on the 23rd day of January, 1942, duly issued its order and mandate to the Board of Tax Appeals affirming the latter's decision herein (R. 107).

III.

Statement of the Case.

A full statement of the case has been given under the heading in "A" in the petition, and in the interest of brevity no repetition of the statement will be made at this point.

IV.

Specification of Errors.

The reasons relied on for the allowance of the writ, appearing in the petition (*ante*, pages 7 to 10), contain the Specification of Errors now urged and are here adopted.

ARGUMENT.

Summary of the Argument.

POINT I.

The Record shows that the worthlessness of Primal Realty Corporation's stock became fixed in 1936 by the following identifiable events: (a) The issuance and service upon the corporation of notices of violations against its real properties under the New York Multiple Dwelling Law; (b) the completion of the assignment of rents, the consequent abandonment of its realty by the corporation and the recognition by the stockholders of the worthlessness of its stock; (c) the payment of tax arrears by decedent.

POINT II.

The finding of the Board of Tax Appeals that the rent assignment to the decedent was made in 1935 was erroneous

and against the weight of evidence and, therefore, the Circuit Court of Appeals was in error when it affirmed the Board's decision upon the ground that there was "substantial evidence" to support its findings.

POINT III.

A decision against the weight of evidence cannot be upheld upon the theory that there is substantial evidence to support it.

POINT I.

The record shows that the worthlessness of Primal Realty Corporation's stock became fixed in 1936 by the following identifiable events: (a) The issuance and service upon the corporation of notices of violations against its real properties under the New York Multiple Dwelling Law; (b) The completion of the assignment of rents, the consequent abandonment of its realty by the corporation and the recognition by the stockholders of the worthlessness of its stock; (c) The payment of tax arrears by decedent.

It is well established that to obtain an allowance of a deduction for a loss arising from an investment in stock the loss is deductible by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness.

Its worthlessness is always a question of fact to be determined in each case.

That Primal was insolvent in 1936 is conclusively established by an examination of its assets and liabilities in that year.

Its Assets.

Its only assets were the six pieces of real estate on Eighth Avenue and 115th Street (Pet. Ex. 4, R. 57). This exhibit consists of two balance sheets, one as of December

31, 1936, taken from the books of the corporation, and the other as of the same date taken from an appraisal of its real estate. Among its assets in each case is an item of $3506.97. In the balance sheet as per the books this item is denominated as "Cash held by Hull". In the balance sheet as per the appraisal this item is listed as "Cash". This cash was evidently held for the account of the decedent, as Mr. Dike, an officer of the corporation which handled the properties as agent, testified that "whatever money he, Mr. Hull, had in our hands was applied to the indebtedness on the houses that he had a mortgage on and was turned over to him and with his own money disbursed to clear up the taxes" (R. 45).

The item of $868.54 (asset) in the balance sheet as per the books is listed as "Due From Agent". In the balance sheet as per the appraisal this item is listed as "Due from Agents for Rents Collected". This item evidently related to rents collected by the collectors for the agents but not turned in. As will appear later, any such moneys belonged to the several mortgagees who had received assignments of the rents. However, it would make no material difference in the result as to the insolvency of the corporation, if these items were included as assets of the corporation, as its only other assets were its real properties. Its liabilities would still be far in excess of its assets.

The value of this real property is entered at its cost in the balance sheet as per the books, $141,500 after deducting reserve. In the other balance sheet the appraised value of the property is given as $77,000.

The fair market value of the real property was not in excess of $92,000.

Its Liabilities.

The face amount of all mortgages upon all the properties was $95,000. There were, however, arrears of interest and

of taxes on these properties. A statement with respect thereto appears in Petitioner's Exhibit 4 (R. 57) in which, as heretofore stated, two balance sheets are set forth, one based upon the cost of the real property and the other upon its value as appraised by the corporation. The liabilities, however, are identical in the two balance sheets. They show the face amount of the mortgages $95,000 and then interest payable of $1693 and taxes payable of $3,019.45; these two items evidently relate to the property held by the mortgagees, Church of the Incarnation and Audrey Woodward, as following these are other items due the decedent for advances to pay tax arrears $15,079.50 and interest thereon $829.37, and interest on his mortgages of $2860. The foregoing items of arrears of taxes and interest amount to $23,481.32. The result as to liabilities is as follows:

Principal due on mortgages	$95,000.00
Arrears of interest on mortgage and Arrears of taxes on the property	23,481.32
Total	$118,481.32

The foregoing evidence of assets and liabilities established the following result:

Value of real property, as per appraisal of Sasse, $92,000, liabilities $118,481.32, leaving a deficiency of $26,481.32.

Even if the finding of the Board as to the value of the real property was correct, viz., $99,000, the deficiency would still be $19,481.32.

In addition to the foregoing was the cost of compliance with the violations of the Multiple Dwelling Law, filed by the Tenement House Department in 1936, which the Board found to be about $12,000 for all of the houses. This would increase the above deficiencies to $38,481.32 or $31,481.32, as the case might be.

The insolvency of the corporation and the worthlessness of its stock became fixed in 1936 by the following identifiable events which occurred in that year: (a) The issuance and service upon the corporation of notices of violations against its real properties under the New York Multiple Dwelling Law; (b) The completion of the assignment of rents, the consequent abandonment of its realty by the corporation, and the recognition by the stockholders of the worthlessness of its stock; (c) The payment of tax arrears by decedent.

Violations.

These violations were issued and served under authority of the Multiple Dwelling Law, which is part of the Consolidated Laws of the State of New York, and known as Chapter 713 of the Laws of 1929. While this law was not put in evidence, reference was made to it, and it served as a basis for a finding (R. 16).

Notices of these violations were served on the corporation in July and August 1936 (Pet. Ex. 11, R. 60-77). Their removal required an expenditure of about $12,000 (R. 16). The corporation was without funds to make the alterations.

They were not merely notices with which the corporation might, at its option, comply. They were mandatory, and compliance therewith was essential to the further use of the property.

Failure to comply with the requirements of the notices subjected the owner to prosecution for misdemeanor and imposed upon it severe civil penalties (Multiple Dwelling Law, Sec. 304, Appendix herein).

Furthermore, failure to comply with the requirements of the notices rendered the corporation liable to damages to occupants of the premises for injuries suffered by reason of such failure.

In *Bernucci* v. *Marfre Holding Corp.*, 171 N. Y. Misc. Rep. 997, the owner was held liable for the death of plaintiff's intestate caused by defective fire protection in a lodging house from which he was trying to escape during a fire. Notice of the violations had been served on the owner, but he had not complied therewith. The Court said: "The statute was intended for the protection of the life and property of the occupants of the building and its breach created a liability *per se* in favor of those injured thereby" (R. 998).

See also: *Weiner* v. *Leroco Realty Corp.*, 279 N. Y. 127.

It is stated in the opinion of the Board that these notices were apparently nothing more than the formal effectuations of legislation passed some time before (R. 20). This is true. But without these notices the law was ineffective; it required these notices to make it effective. Until they were served the corporation could ignore the condition of the properties with impunity.

Apart from all technicalities, it is an undisputed fact that violations of the character enumerated in these notices had to be corrected by the owner and that the expense thereof made the property less valuable to the extent of the cost of such changes.

The expense of compliance with the requirements increased the rental value but little (R. 16).

The Circuit Court of Appeals in its opinion, at page 504, said: "Nevertheless the receipt of the notices did not alter the condition of the property. There was no intention to abandon it, and the corporation was still a going concern in 1936". (R. 106)

But these factors are immaterial when consideration is given to the significance of the violations.

Payment of Tax Arrears.

In 1936 decedent paid all the tax arrears on the properties taken over by him (R. 44). The Board made a specific

finding with regard thereto (R. 16). *But neither the Board nor the Circuit Court took cognizance of this important identifiable event.*

Abandonment of Its Properties.

While the corporation assigned the rents of the property upon which the Church of the Incarnation held a mortgage to the mortgagee in 1935, and, perhaps, also the rents of the property upon which Woodward held a mortgage (although this does not clearly appear), it retained control over the other properties upon which decedent held mortgages until 1936. While there was no formal written assignment of the rents from these four properties, yet there was an oral agreement with respect thereto. The Dike Corporation was agent for all of the properties. Up to 1936 it commingled the rents from all of them and paid the general expenses as might be necessary; but in 1936, by agreement between the holders of the stock of Primal and the mortgagees, the rentals from each property were kept separate and distinct and the taxes and other charges against each property were paid from its rentals. From that time on the corporation ceased to function with respect to the control of its properties. It had in effect abandoned the properties to the mortgagees. On demand of the mortgagees the rents were turned over to them, and they assumed the payment of taxes, retaining any overplus. The repairs necessitated by the notices of violations were made in subsequent years. They must have been made by the mortgagees for Primal was insolvent and had no cash or other assets with which it could have made the repairs.

In 1936, there was a conference between Mr. Dike, representing the Dike interest of one-third of the corporation, and the decedent, who represented another one-third interest (evidently Mr. Titchenor, the third stockholder, was

dead at this time) (R. 35). They discussed the condition of the corporation and both refused to put up any more money for the corporation. Decedent stated that he was only interested in the properties upon which he held mortgages and not in the other two properties.

With its treasury empty and the properties in the hands of the mortgagees, the corporation was helpless and it was absolutely impossible for it to carry on.

It was not necessary that the corporation should lose, or part with, the title to its real property by foreclosure or otherwise, or that it should be dissolved or judicially declared insolvent, to establish the loss in 1936. It was sufficient if, as a matter of fact, the corporation was insolvent.

The Board in its opinion said that no development in 1936 was shown to have been of such a decisive nature as to justify characterization as an "identifiable event" indicating that reasonable hope and expectation of value at some future time has been foreclosed "as might be the case on a showing of such events as bankruptcy, suspension of business, liquidation or receivership" (R. 22).

In so far as the Board intended to state that these enumerated events were necessary to be shown to establish worthlessness of the stock, it is not supported by the decisions of the courts, or of the Board itself.

In *Hancock* v. *Commissioner of Internal Revenue*, 105 F. (2d) 153, the Court held that the requirement that losses for income tax purposes, usually evidenced by closed and completed transactions, does not preclude deducting of loss in the year when the investment actually becomes worthless, though the owner has not parted with title to the property. The Court said:

> "While it is true, as the Treasury regulations have declared for many years, that 'losses must actually be evidenced by closed and completed transactions', this

> does not preclude the taking of a loss in the year when the investment actually becomes worthless, even though the taxpayer has not parted with his title (citing De-Loss *v.* Commissioner, 6 Cir. 100 Fed. (2nd) 966)" (R. 154).

It is the contention of the petitioner that all of the facts herein recited, showing the condition of the corporation, the assignments of rents, the refusal of the stockholders to put in more money, the fire retarding violations, and the payment of taxes in arrears, all constitute sufficient identifiable events to show the worthlessness of Primal stock in 1936, under the rule laid down in the above case.

To the same effect is the case of *Perkins* v. *Commissioner of Internal Revenue*, 41 B. T. A. 1225. At page 1230 the Board said:

> "The evidence seems to us to warrant the conclusion that two identifiable events sufficient to indicate the worthlessness of petitioner's capital investment took place in the taxable year 1936. The first was the loss of the corporation's tenant. The critical nature of this development was demonstrated by the subsequent filing of a voluntary petition in bankruptcy which might also be treated as an identifiable event. * * *
>
> Here, however, petitioner's claim of worthlessness being adequately supported by the independent event consisting of the loss of petitioner's principal asset, his contention that the stock was worthless prior to and separate from the bankruptcy is sufficient to eliminate the necessity of considering that point. * * *
>
> A loss predicated upon the worthlessness of stock may be allowed independent of the occurrence of any sale or exchange. We see no reason why it should not also be allowed independent of any liquidation."

In *Commissioner of Internal Revenue* v. *W. W. Hoffman*, 117 F. (2d) 987, the Board sustained a loss when the petitioners abandoned improved real property owned by

them, subject to a mortgage upon which they had not assumed liability. The loss claimed was for the year 1934. Violations pursuant to the Multiple Dwelling Law were filed against the property and the petitioners notified the mortgagee that they had abandoned their interest. The property was not foreclosed until after the year 1934. The Court affirmed the decision of the Board and said:

> "Upon amply sufficient evidence the Board found specifically that the taxpayers' interest in the property became worthless in 1934. We see no valid ground to differentiate between a loss suffered on real estate and one on personalty if worthlessness is definitely established. Compare Wieboldt *v.* Commissioner, 7 Cir. 113 Fed. 2, 384-6.
>
> On the authority of Denman *v.* Brumback, 6 Cir. 58 Fed. 2 128-9 and Rhodes *v.* Commissioner, 6 Cir. 100 Fed. 2, 966, the Board's decision is affirmed."

The facts established by the record bring the present case fairly within the law laid down in the above cases and establish the worthlessness of Primal's stock in 1936.

The corporation had practically abandoned its real property by assigning all of the rents therefrom to the mortgagees; it was willing to convey the properties to the mortgagees; the fire retarding violations were served in that year; its loss in that year was $6255.70 (R. 58). Its assets were far below its liabilities; it had no cash or other assets with which to pay the arrears of interest or taxes or to comply with the violations; its stockholders refused to put up any money for its relief; and they considered its stock worthless, as evidenced by the holder of one-third of the stock offering to give it to decedent, who refused to accept it because he thought it was worthless.

As we have pointed out, there were arrears of interest on mortgages and of taxes in 1936 amounting to $23,481.32. In addition to these, were the moneys necessary to comply

with the municipal violations amounting to $12,000. The corporation could not regain possession of the properties which it had turned over to the mortgagees without paying their mortgages, the face value of which was $95,000. The corporation had no money and no assets whatsoever. There was no hope whatever that the corporation could raise the money necessary to discharge these obligations, and whatever hope any one may have had that it could do so was not founded on any degree of reason.

These facts established the worthlessness of the stock quite as conclusively as did the facts in any of the above cases.

In retrospect, in examining the operations of the corporation from the years 1933 to 1937, it may be seen that the corporation was practically insolvent in 1935. But the decedent did not have the benefit of retrospect. He had to speculate as to the future. This he could not foresee with accuracy. He had the right to indulge in hope and expectation that conditions would improve and that the value of the real property would increase so that the corporation might carry on and make yearly profits. Such had been the condition of the properties up to the year 1932. The profits had been sufficient to pay off a second mortgage upon them. The corporation was met by the general depression that began about 1932 and reached its lowest ebb around 1935 or 1936. Owners of real property which had weathered conditions down to 1935 had a universal hope and reasonable expectation that the bottom of the depression, with its effect on real property, had been reached, and that there would shortly be a turn and material improvement. Decedent had reason to indulge in this hope and expectation in 1935; that they would not materialize was not then within his definite knowledge or to be reasonably anticipated. It was not until the happening of the identifiable events of 1936 that this became obvious.

It is unfair to a taxpayer, where stock of a corporation which he owns at some period becomes definitely worthless, to compel the stockholder to speculate and determine in just what previous year it became worthless.

Point II.

The finding of the Board of Tax Appeals that the rent assignment to the decedent was made in 1935 was erroneous and against the weight of evidence, and, therefore, the Circuit Court of Appeals was in error when it affirmed the Board's decision upon the ground that there was "substantial evidence" to support its finding.

The Board of Tax Appeals relied principally upon its finding that the rent assignment to decedent was made in 1935 (R. 22). It predicated that finding upon the statement made by the witness Oscar Dike, referring to the latter part of 1935, that instead of issuing one statement from the managing agent, monthly statements were issued on each of the properties (R. 42). Without signifying any date the question was asked of Dike whether he meant that there was an assignment of rentals to the mortgagee and he replied that at first there was only a verbal agreement (R. 22, 43). *The witness gave clear testimony, however, that the assignment to the decedent was made in 1936.* He stated that in that year there was a change as to the manner of handling the account and that the mortgagees demanded that they should have control of their individual mortgage holdings (R. 36, 37). He also testified that when the violations were issued in the middle of 1936 the decedent had "just taken over the responsibility of the houses upon which he held mortgages" (R. 42). *This testimony was given immediately prior to the testimony relied upon by the Board of Tax Appeals to show that the assignment was made in 1935.* Then Mr. Dike testified that it was in the

year 1936 that decedent paid the tax arrears "when we turned everything over to him * * *" (R. 44).

It is submitted that it appears clearly from the entire body of the witness' testimony, rather than the isolated portion relied upon by the Board of Tax Appeals, that the rent assignment to decedent was made in 1936. The Circuit Court of Appeals so found. It is apparent that the principal finding made by the Board of Tax Appeals is without substantial evidence, and, therefore, the Circuit Court erred in its conclusion that the decision of the Board was supported by substantial evidence.

Point III.

A decision against the weight of evidence cannot be upheld upon the theory that there is substantial evidence to support it.

In 1936 the interest and tax arrears amounted to $23,481.32. The amount necessary to be expended to comply with the violations issued against the corporation's properties, under the New York Multiple Dwelling Law, amounted to $12,000. The rents of all of the corporation's properties had been assigned to the respective mortgagees. The corporation had no money and no assets whatsoever. It had no hope that it could raise the necessary money to discharge these obligations, and whatever hope anyone may have had was not founded on any degree of reason whatsoever.

The refusal of the stockholders to advance any more money to the corporation's treasury constituted a virtual abandonment of the properties.

The witness Oscar Dike (R. 45), testified: "He (referring to the decedent) wanted to know what I wanted to do and I said I can't do anything". After being asked a question whether the decedent was going to foreclose Mr. Dike gave the following answer: "We discussed it in an informal manner * * *."

The facts established by the within record bring the case at bar within the rule laid down in *Commissioner of Internal Revenue* v. *W. W. Hoffman*, 117 F. (2d) 987. It is to be noted that the Commissioner took no appeal from the decision of the Circuit Court of Appeals affirming the decision of the Board in the *Hoffman* case.

In that case the petitioners notified the mortgagee by letter that they had abandoned their interest in the property. This notice was given in the year 1934. In that case, as in the instant case, notices pursuant to the New York Multiple Dwelling Law had been filed against the property. The property was not foreclosed until the year 1935. The Board and the Circuit Court of Appeals both held that the loss occurred in the year 1934.

In the case at bar we have virtually the same situation except that title to the property involved is held in the name of a corporation and the loss claimed is for the worthlessness of the corporation's stock.

As appears by the record, the decedent and Mr. Dike discussed the situation in an informal manner. We see no basis to differentiate between a written notice given by the owner of mortgaged property to the mortgagee of their intention to abandon same and the informal discussion of the stockholders of a corporation deciding that they would put no more money into the treasury of the corporation when at the time such discussion was had all of the rents had been assigned to the respective mortgagees. An intention to abandon or a direct notice of abandonment does not become the more effective because it has been reduced to writing.

Treasury Regulations 94, promulgated under the Revenue Act of 1936, provide that in losses by individuals substance and not mere form will govern in determining the right of deduction. The facts in the case at bar should be viewed in the light of such rule.

The Circuit Court apparently affirmed the decision of the Board upon the ground that it could not say that the Board did not have substantial evidence to support its finding, and also that the decision, if further reviewed, was based upon findings supported by the record. *Helvering* v. *National Grocery Co.*, 304 U. S. 282, was cited.

In that case this Court granted certiorari because of the importance in the administration of the revenue laws of the matter there presented. This Court said at page 291:

> "There was *ample evidence* to support the finding of the Board of Tax Appeals."

In *Helvering* v. *Rankin*, 295 U. S. 123, the case was remanded to the Circuit Court for further consideration on the question whether a finding of the Board of Tax Appeals was without *substantial support* in the evidence.

There is nothing in the taxing statute or in the Regulations which requires that a decision of the Board of Tax Appeals *against the weight of evidence* should be sustained.

That a decision made by any court against the weight of evidence should be set aside or reversed in an appellate court is so firmly fixed in our jurisprudence that it requires no citation of authorities here.

It is to the interest of the proper administration of the Revenue Act that this Court review the facts in this record and pass upon the question whether the so-called substantial evidence is against the weight of evidence.

This Court stated in *Helvering* v. *National Grocery Co.* (*supra*) that the function of the Board is "to draw inferences, and weigh the evidence, and to declare the result". It did not say that the Board is vested with power to render a decision contrary to and against the weight of the evidence; nor is any such power found in the taxing statutes or in the Acts of Congress conferring jurisdiction upon the Board itself.

In order to obtain the necessary power to tax the income of citizens of the United States, it was necessary that a constitutional amendment be passed and this was done by the passage of Amendment No. 16 to the Constitution of the United States. Congress then proceeded to legislate under this amendment, declaring what shall be income and what shall be the deductions allowed taxpayers in computing and adjusting their net income. In the early days of income tax administration the Board of Tax Appeals was not in existence. It is a creature of the statute and is vested with such powers as are given to it by the statute. No express power has been given by Congress to the Board of Tax Appeals to render decisions not supported by the weight of the evidence in the case. To affirm the decision of the Board in the case at bar is to estop the taxpayer, arbitrarily, from deducting his loss, which right is given to him under the statute. Congress, by the creation of the Board of Tax Appeals, must have meant to institute an administrative board, wherein the parties are given an opportunity to petition for relief against a decision of the Commissioner. While the Board is purely of an administrative character, it could not have been contemplated by Congress that the Board be vested with power to render decisions contrary to and against the weight of evidence. The administrative function of the Board was not intended to be an appeal to the tax collector's conscience.

The taxpayer herein has proved his loss in accordance with the requirements of the statute and regulations. He should not be deprived of his property without due process of law—upon a determination of the Commissioner and the Board against the weight of evidence and by a Circuit Court affirmance, based upon the "substantial evidence" rule.

In Conclusion.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should issue.

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Attorney and Counsel for Petitioner.

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Of Counsel.

APPENDIX.

Statutes and Regulations Involved.

Revenue Act of 1936 (Public 740, 74th Congress)

"Sec. 23. Deductions from Gross income.

In computing net income there shall be allowed as deductions:

* * * * * * *

(e) Losses by individuals—in the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * * *

(2) If incurred in any transaction entered into for profit, though not connected with the trade or business;"

Treasury Regulations 94.

Article 23 (e)—1. Losses by individuals. —

* * * * * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. * * *

Art. 23 (e)—4. Shrinkage in value of stocks.

A person possessing stock of a corporation cannot deduct from gross income any amount claimed as a loss merely on account of shrinkage in value of such stock through fluctuation of the market or otherwise. The loss allowable in such cases is that actually suffered when the stock is disposed of. If stock of a corporation becomes worthless, its cost or other basis as determined and adjusted under section 113 is deductible by the owner for the taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness. * * *

New York Multiple Dwelling Law.

Sec. 304. Penalties for violations. 1. Every person who shall violate or assist in the violation of any provision of this chapter shall be guilty of a misdemeanor punishable by imprisonment for ten days for each and every day that such violation shall continue or by a fine of not less than ten dollars nor more than one hundred dollars if the offense be not wilful, or of two hundred and fifty dollars if the offense be wilful, and in every case of ten dollars for each day after the first that such violation shall continue, or by both such fine and imprisonment in the discretion of the court; * * *.

The owner of any multiple dwelling or part thereof, or of any building or structure upon the same lot with a dwelling, or of the said lot, where any violation of this chapter or a nuisance exists, and any person who shall violate or assist in violating any provision of this chapter, or any notice or order of the department charged with its enforcement, shall also jointly and severally for each such violation and each such nuisance be subject to a civil penalty of fifty dollars. Such person shall also be liable for all costs, expenses and disbursements paid or incurred by said department, by any of the officers thereof or by any agent, employee or contractor of the same, in the removal of any such nuisance or violation. Any person who, having been served with a notice or order to remove any such nuisance or violation, shall fail to comply with said notice or order within five days after such service, or shall continue to violate any provision or requirement of this chapter in the respect named in said notice or order, shall also be subject to a civil penalty of two hundred and fifty dollars. For the recovery of any such penalties, costs, expenses or disbursements, an action may be brought in any court of civil jurisdiction in said cities. * * *

3. The term "person" as used in this section shall include the owner, mortgagee in possession, assignee of rents, lessee, agent or any other person, firm or corporation, directly or indirectly in control of such dwelling.

Sec. 307. Liens. Every fine imposed by judgment under section three hundred and four of this chapter upon an

owner of a dwelling shall be a lien upon the house in relation to which the fine is imposed from the time of the filing of a certified copy of said judgment in the office of the clerk of the county in which said dwelling is situated, subject only to taxes, assessments and water rates and to such mortgage and mechanic's liens as may exist thereon prior to such filing; and it shall be the duty of the department charged with the enforcement of this chapter upon the entry of said judgment to forthwith file the copy as aforesaid, and such copy upon such filing, shall be forthwith indexed by the clerk in the index of mechanic's liens.

Sec. 308. *Lis pendens.* In any action or proceeding instituted by the department charged with the enforcement of this chapter, the plaintiff or petitioner may file in the county clerk's office of the county where the property affected by such action or proceeding is situated, a notice of the pendency of such action or proceeding.

Said notice may be filed at the time of the commencement of the action or proceeding, or at any time afterwards before final judgment or order, or at any time after the service of any notice or order issued by said department. Such notice shall have the same force and effect as the notice of pendency of action provided for in the civil practice act. Each county clerk with whom such notice is filed shall record it, and shall index it to the name of each person specified in a direction subscribed by the corporation counsel.

* * *.

No. 1155

In the Supreme Court of the United States

OCTOBER TERM, 1943

ESTATE OF WILLIAM S. HULL, DECEASED, MESSRS. JONATHAN W. HULL AND WILLIAM HARRIS CARPENTER, SURVIVING EXECUTORS, PETITIONERS

v.

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INDEX

CITATIONS

459329—42

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v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 13–22) is unreported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 104–107) is reported at 124 F. (2d) 503.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 23, 1942 (R. 107). The peti-

tion for a writ of certiorari was filed April 17, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Was there substantial evidence to support the determination of the Board of Tax Appeals that the stock of Primal Realty Corporation did not become worthless in 1936?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

> ART. 23 (e)–1. *Losses by individuals.*—Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise

are fully deductible if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, or (c) arising from fires, storms, shipwreck, or other casualty, or theft, and a deduction therefor has not prior to the filing of the return been claimed for estate tax purposes in the estate tax return, or (d) if not prohibited or limited by any of the following sections of the Act: Section 23 (g), relating to wagering losses; section 24 (a) (6), relating to losses from sales or exchanges of property between members of a family or between a corporation and its shareholders; section 112, relating to recognition of gain or loss upon sales or exchanges of property; section 117, relating to limitation on losses recognized by section 112 upon the sale or exchange of capital assets; section 118, relating to losses on wash sales of stock or securities; section 251, relating to income from sources within possessions of United States; and section 252, relating to citizens of possessions of United States. See section 213 as to limitation upon losses sustained by nonresident aliens.

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full con-

sideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. See section 113 (b).

* * * * *

ART. 23 (e)–4. *Shrinkage in value of stocks.*—A person possessing stock of a corporation can not deduct from gross income any amount claimed as a loss merely on account of shrinkage in value of such stock through fluctuation of the market or otherwise. The loss allowable in such cases is that actually suffered when the stock is disposed of. If stock of a corporation becomes worthless, its cost or other basis as determined and adjusted under section 113 is deductible by the owner for the taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness. Federal or State authorities incident to the regulation of banks and certain other corporations may require that stock be charged off as worthless or written down to a nominal value. If, in any such case, the basis of the requirement is the worthlessness of the stock, such charging off or writing down will, for income tax purposes, be considered prima facie evidence of worthlessness; but if the charging off or writing down is due to market fluctuations, or if no reasonable attempt has been made to determine worthlessness, no deduction for income tax purposes of the amount so charged off or written down can be allowed. For dealers in securities, see article 22 (c)–5. For

limitations on deductions for losses from sales or exchanges of capital assets generally, including stocks and bonds, see section 117.

STATEMENT

The Commissioner of Internal Revenue determined a deficiency in the income tax of the decedent, William S. Hull (hereinafter called taxpayer), for 1936. The determination was based upon disallowance of a deduction for stock of the Primal Realty Corporation, alleged to have become worthless in 1936 (R. 8–11). The Board of Tax Appeals sustained the Commissioner's determination (R. 13–23), and the Circuit Court of Appeals affirmed (R. 104–107).

The following evidentiary facts were found by the Board of Tax Appeals. In 1929 taxpayer purchased one-third of the stock of the Primal Realty Corporation for $18,200. The balance was subscribed for by several other individuals. Primal Realty Corporation thereupon purchased six contiguous parcels of real estate on the corner of Eighth Avenue and West 115th Street, New York City. The price was $157,500 of which $54,600 was paid in cash and the balance was represented by mortgages. Taxpayer himself held the first mortgages, aggregating $64,000, on four of the six parcels. There was also a second mortgage on the properties which was paid off in 1932. Each of the properties was improved by a five-story tene-

ment building with a store on the ground floor (R. 13–15).

So far as appears from the record Primal Realty Corporation has never given up title to or abandoned these properties. They continue to be managed for Primal Realty Corporation by O. D. and H. V. Dike, real estate agents, who own one-third of the stock of Primal (R. 15, 20–21).

The results of the operations of Primal for the years 1933 to 1937, inclusive, are as follows (R. 16–17):

Year	Gross rents	Net loss for the year	Deficit at the end of the year
1933	$14,326.00	$5,065.20	$10,508.72
1934	13,270.30	7,475.32	16,468.62
1935	15,489.73	3,612.06	20,000.68
1936	16,374.94	6,255.70	26,336.36
1937	17,406.25	399.61	27,326.13

The balance sheet of Primal as at the end of 1936, appended to the corporation's income tax return for that year, showed assets of $146,709.57 and liabilities, exclusive of capital stock, of $118,445.95. The fair market value of the properties was $99,000 in 1936 and had been the same in 1933, 1934, and 1935 (R. 16–17).

In 1933 the new Eighth Avenue subway began operation. In 1936 a change from white to colored occupancy was in progress. Both of these factors had a tendency to improve the rental value of the properties (R. 14–15, 19). It was the opinion of real estate men that conditions would improve, and

they did improve somewhat in 1937, although the improvement was not such as to cause any material increase in the value of the properties in the years 1937 to 1940 (R. 17).

In 1935 Primal assigned the income from each of the properties to the holder of the first mortgage on that property, and thereafter the rents were paid by the agents directly to the mortgagees (R. 15–16, 20–22).[1] In the summer of 1936 the city gave notice to Primal of violations of the Multiple Dwelling Law by reason of lack of fire-retarding and sanitary installations. An expenditure of about $2,000 for each parcel was required to remove the violations. These expenditures were made and the work was done in 1937, 1938 and 1939. Receipt of the notices in 1936 was of no especial significance both because they were not complied with in that year and because the violations which they listed had existed for some time prior to 1936. (R. 16, 20.)

On the basis of these evidentiary findings, the Board held that there was no showing of an identifiable event clearly indicating worthlessness of the Primal stock in 1936, that any indicia of worthlessness in 1936 had been present for several years prior to 1936, and, consequently, that the taxpayer's estate had failed to show that the Primal stock

[1] Although the evidence is ambiguous as to whether the assignment to the taxpayer, which was oral, was made in 1935 or 1936, the Board found that the assignment occurred in the latter part of 1935 (R. 21–22).

became worthless in 1936. It concluded that the right to a deduction for loss realized in 1936 had not been established (R. 18–22). The Circuit Court of Appeals held that the Board's findings were supported by substantial evidence and accordingly affirmed its decision (R. 106–107).

ARGUMENT

The facts recited in the Statement show that there was substantial evidence to support the Board's finding that the shares of Primal Realty Corporation did not become worthless in 1936. Accordingly, the court below correctly affirmed the Board's decision. *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282; *Colorado Bank* v. *Commissioner,* 305 U. S. 23; *Helvering* v. *Lazarus & Co.,* 308 U. S. 252; *Helvering* v. *Kehoe,* 309 U. S. 277; *Wilmington Trust Co.* v. *Helvering,* decided on April 27, 1942, No. 775, present Term. There is obviously no occasion for further review by this Court.

Respectfully submitted.

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